

# Mutual Recognition of Prison Sentences

2013 Year of the Citizen Conference 'The Legal Position of the  
Accused and Convicted Citizen in the European Union'

Maastricht University | 31 May 2013

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# Context

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1999 – Tampere – MR cornerstone judicial co-operation

2000 – Implementation programme: MR designed to

- strengthen co-operation between MS
- enhance protection of individual rights
- ease process of rehabilitating offenders
- contribute to legal certainty in the EU

MR presupposes trust in MS' criminal justice systems based on a shared commitment to..."respect for human rights, fundamental freedoms and the rule of law"

December 2009 Procedural Rights Roadmap (pre-trial detention)

July-Nov 2011: 'detention' Green Paper EC (also post-trial)

parallel publication IRCP detention study (2 books, open access)

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## 40

Cross-border execution  
of judgements  
involving deprivation  
of liberty in the EUOvercoming  
legal and  
practical  
problems  
through  
flanking  
measures

The introduction in 2008 of the Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union sparked discussions as to whether the practical operation of the instrument would be compatible with its very objective, being the enhancement of detained persons' social rehabilitation prospects.

Transferring detained people back to their respective Member State of residence and/or nationality within the mutual recognition framework is somewhat precarious in light of the often substantial variety of Member States' legal and prison systems. In this context, and following a call for tender by the European Commission, the authors conducted the biggest study to date on Member States' material detention conditions, early/conditional release provisions and sentence execution modalities. In addition to exploring the diversity of legal frameworks, the study also assessed practitioners' views on cross-border execution of custodial sentences in the EU.

This book contains both the EU level legal and practitioners' analyses as well as the high level final report to the study, confirming preliminary concerns that flanking measures are urgently needed for a proper operation of the Framework Decision.

This is essential reading for EU policy makers, judicial and law enforcement authorities and for defence lawyers throughout the Union. Undoubtedly, this book will be an asset to everyone who is involved in or taking an interest in detention issues and cross-border execution of judgements involving deprivation of liberty in the EU.

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# Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States

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This book contains the individual Member State reports resulting from the legal and practitioners' analyses, backed by additional information drawn from monitoring and evaluation conducted at Council of Europe (Committee for the Prevention of Torture) and United Nation levels.

This is essential reading for EU policy makers, judicial and law enforcement authorities and for defence lawyers throughout the Union. Undoubtedly, this book will be an asset to everyone who is involved in or taking an interest in detention issues and cross border execution of judgements involving deprivation of liberty in the EU.

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# Principal MR characteristics

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issuing state and executing state

- not merely a matter of new terminology

based on issuing/execution of

- 'order + certificate' or 'genuine warrant'

no more exequatur/conversion/locus-based procedure

- at least not initially (e.g. EAW & EC explanatory report)
  - full trust in issuing MS' decision
- in meantime: conversion is back in (for MR of custodial sentences)

no more dual criminality requirement

- for standardised list 32+ offence types
- according to definition issuing MS (+ punishable 3y+)

roll-out through FDs, including on custodial sentences

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# 2008 FD on MR custodial sentences

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revisiting 2002 FD on the EAW for 'transfer back home' and *aut dedere aut exequi* scenario's

+ new autonomous compulsory transfer of prisoner mechanism to MS of nationality and residence

buzzwords (official rationale)

- social rehabilitation and succesful reintegration

however position prisoner/executing MS radically changed antecedents

- 1983 CoE transfer of prisoner Convention + 1997 Protocol
- humanitarian (1983) + escape/expulsion scenarios (1997)

assessment (IRCP study – methodology)

- MR creates new problems
- flanking measures to be considered

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# Methodology

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## EU-level and MS legal analysis

- European/int'l norms & standards relating to detention conditions, sentence execution and prisoner transfer
- UN, CoE (EPR-centered + CPT/ECtHR) and EU
- full national perspectives + uploads
- through SPOC-network & online questionnaires

## practitioner's survey (cross-border analysis)

- implementation seminars + online questionnaires
- defence lawyers – judges – prison administrators

## additional int'l/European stakeholder consultation

## validation workshop

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# MS overall compliance

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MS	Y %	N %	MS	Y %	N %
Finland	100	0	Latvia	67	34
Slovakia	98	3	Czech Republic	66	35
Estonia	97	4	Austria	65	36
Hungary	93	8	France	65	36
Germany	84	17	Romania	65	36
Belgium	82	19	Greece	62	39
Malta	78	23	Netherlands	60	41
Denmark	74	27	Lithuania	55	46
Slovenia	74	27	UK	55	46
Spain	74	27	Bulgaria	53	48
Italy	72	29	Poland	51	49
Cyprus	69	32	Ireland	32	69

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# Problems (1)

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social rehabilitation (cornerstone)

- info on material detention conditions
- standards relating to the progression principle, to ties with friends and family and to educational, recreational, work/training and welfare programmes

knowledge of the FD and (access to) information on foreign law & practices

compulsory nature FD & poor procedural status

dual criminality issues

significant variations in MS' sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions

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# Problems (2)

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## subordinate material detention conditions (highlights)

- overcrowding: cell sharing, cell size and cell capacity
- sanitation facilities, clothing, bedding and nutrition: privacy, screening and appropriate clothing
- health care: injury detection, women's health care, forced feeding and hunger strikers, monitoring prisoners at risk of suicide, medical examination (upon arrival), accommodation of vulnerable prisoners
- other: special cells, recording, staff contact, monitoring, security assessments, protection status and strip searches

political note: variably assessed in context of EAW (pretrial detention abroad for own nationals) and FD 2008

- partial distrust shifting, i.e. for transfer in context of EAW! = illogical
  - MR precisely improved pretrial detention in surrender context

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# Flanking measures (1)

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enhancing knowledge and (access to) information

- implementation handbook, training and monitoring
- access to information

protection of prisoners' (fundamental) rights by improving material detention conditions

- training and best practice promotion
- increasing the frequency of CPT inspections
- introducing binding European minimum standards
  - need – EU competence – political feasibility

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# Flanking measures (2)

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maintaining the double criminality requirement (+ EULOCs)  
safeguarding sentencing equivalence & supporting sentence execution through

- approximation: 2 generic severity rankings
- dual lex mitior + no unreasonable aggravation (review)

improving prisoners' procedural rights

- introducing a motivational duty for issuing states
  - including re sufficiently high material conditions
- right to an 'informed' opinion + to legal assistance
- competent authorities necessarily judicial bodies?
- no, but right to a judicial review

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# Conclusion: Action Needed!

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## EU decision-making level

change FD? | Commission initiative upcoming to do practical standard-setting in line with our main recommendation (motivational duty)

## domestic legislative level (implementing legislation)

- Belgium: Implementing Act of May 15, 2012
  - plain and strict transposition of FD
- The Netherlands: Implementing Act of July 12, 2012
  - at least followed recommendations partially: dual criminality requirement reintroduced; judicial review possibility including entitlement to legal counsel

## active/lobbyist defence and legal representation

- lobby at EU level
  - urgent need to move beyond roadmap
- ECtHR and CJEU (prejudicial) procedures (even if much overinterpreted)

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